

HEARING DATE: OCTOBER 5, 2000
HEARING TIME: 10:00 A.M.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

RANDALLS ISLAND FAMILY GOLF
CENTERS, INC., et al.,

Chapter 11
Case Nos. 00-41065 (SMB)
through 00-41196 (SMB)

Debtors.

(Jointly Administered)

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**NOTICE OF MOTION FOR ORDER REDUCING
AND/OR LIMITING GBCC FAMILY GOLF CENTER'S
TIME TO ASSUME OR REJECT NON-RESIDENTIAL
REAL PROPERTY LEASE**

PLEASE TAKE NOTICE, that upon the motion (the "Motion") of All In Fun Enterprises, Inc. ("AIF"), by its attorneys, Todtman, Nachamie, Spizz & Johns, P.C. and Jackier, Gould, Bean, Upfal & Eizelman, the undersigned shall move this Court before the Honorable Stuart M. Bernstein, Chief United States Bankruptcy Judge in his courtroom #729 at the United States Bankruptcy Court for the Southern

District of New York, One Bowling Green, New York, New York **on the 5th day of October, 2000 at 10:00 A.M.**, in the forenoon of that day or as soon thereafter as counsel may be heard, for an order pursuant to §365(d)(4) of the Bankruptcy Code reducing and/or further limiting the time within which GBCC Family Golf Centers, Inc. shall have to assume or reject a certain non-residential real property lease with AIF and granting AIF such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that objections, if any, to the Motion, must be filed with the clerk of the bankruptcy court (with a courtesy copy delivered to the Chambers of the Honorable Stuart M. Bernstein) and received by the attorneys for AIF at the address set forth below no less than three (3) days before the return date of the Motion.

Dated: New York, New York
September 15, 2000

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C.
Attorneys for All In Fun Enterprises, Inc.

By: /S/ SCOTT S. MARKOWITZ
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CENTERS, INC., <u>et al.</u> ,	:	Case Nos. 00-41065 (SMB)
	:	through 00-41196 (SMB)
	:	
Debtors.	:	(Jointly Administered)
	:	

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**MOTION OF ALL IN FUN ENTERPRISES, INC. FOR ORDER REDUCING TIME BY
WHICH DEBTOR GBGC FAMILY GOLF CENTERS, INC. MUST ASSUME OR REJECT
A CERTAIN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY**

TO: THE HONORABLE STUART M. BERNSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

All In Fun Enterprises, Inc. ("AIF"), a creditor and lessor under an unexpired lease of nonresidential real property herein, by its counsel, Todtman, Nachamie, Spizz & Johns, and Jackier,

Gould, Bean, Upfal & Eizelman, for its Motion for Order Reducing Time By Which Debtor Must Assume or Reject a Certain Unexpired Lease of Nonresidential Real Property (the "Motion"), states as follows:

Background

1. On May 4, 2000 (the "Petition Date"), each of the Debtors in these jointly administered Chapter 11 cases (collectively, the "Debtors") filed Voluntary Petitions for relief pursuant to chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate and manage their businesses, respectively, as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. GBGC Family Golf Centers, Inc. ("GBGC") is one of the affiliated Debtors herein. Among the golf facilities operated by GBGC is Golden Bear Golf Center at Oasis (the "Golf Center"), located at 39500 Five Mile Road in Plymouth, Michigan, which is operated pursuant to a Lease Agreement described below.

The Lease Agreement

3. On or about January 31, 1997, AIF and Golden Bear Golf Centers, Inc., the predecessor-in-interest to GBGC, entered into a Lease Agreement (the "Lease Agreement") with respect to the Golf Center. A copy of the Lease Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

4. Pursuant to the Lease Agreement, among other things, GBGC agreed to lease, from AIF, the Golf Center, including all buildings, structures, other improvements, fixtures, and personal property located at the Golf Center (the "Leased Property") for an initial term of twenty (20) years, commencing February 1, 1997 and terminating on the last day of January 2017 (the "Lease Term").

5. Thus, as of the Petition Date and to date, the Lease Agreement was an unexpired lease of nonresidential real property within the meaning of Section 365 of the Bankruptcy Code.

6. As of the date of this Motion, GBGC has neither assumed nor rejected the Lease Agreement.

**The Extension of the Debtor's Time to
Assume or Reject Unexpired Leases of Nonresidential Real Property**

7. Upon motion of the Debtors, this Court entered its Order Pursuant to Section 365(d)(4) of the Bankruptcy Code Extending the Time Within Which the Debtors-in-Possession Must Elect to Assume or Reject their Unexpired Leases and Nonresidential Real Property, dated July 28, 2000 (the "Extension Order").

8. Pursuant to the Extension Order, among other things, the Court extended the time period within which the Debtors must seek to assume or reject their unexpired leases of nonresidential real property, including the Lease Agreement, through and including October 9, 2000, without prejudice to: (a) the Debtors right to seek a further extension of such time; and (b) any lessor's right to request a reduction of such time.

**The Standard for Modifying a Debtor's Time to
Assume or Reject Unexpired Leases of Nonresidential Real Property**

9. Section 365(d)(4) of the Bankruptcy Code provides, in pertinent part, as follows:

Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease an nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

10. Section 365(d)(4) thus provides that a court may extend for "cause" the period by which the debtor must assume or reject a lease of nonresidential real property. The purpose of Section 365(d)(4) is to "protect parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." *In re Koenig Sporting Goods, Inc.*, 203 F. 3d 986, 989 (6th Cir. 2000), citing *Tully Construction Co. v. Cannonsburg Environmental Assoc.*, 72 F.3d 1260, 1266 (6th Cir. 1996).

11. In *South Street Seaport Limited Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755 (2d Cir. 1996), the United States Court of Appeals for the Second Circuit reviewed a decision of the United States District Court for the Southern District of New York granting an extension of time for a debtor to assume or reject an unexpired lease of nonresidential real property. The Court of Appeals observed that the decision to grant or deny such a motion for an extension of time is within the sound discretion of the Bankruptcy Court. *Id.* at 761-62 (citations omitted). Relying upon its decision in *Theatre Holding Corp. v. Mauro*, 681 F.2d 102 (2d Cir. 1982), the Court of Appeals then enunciated the several factors that must be considered in evaluating whether to extend time for a debtor-in-possession to assume or reject an unexpired lease under Section 365(d)(4) of the Bankruptcy Code. Those factors are as follows:

(1) whether the debtor was paying for the use of the property; (2) whether the debtors continued occupation . . . could damage the lessor beyond the compensation available under the Bankruptcy Code; (3) whether the lease is the debtor's primary asset; and (4) whether the debtor has had sufficient time to formulate a plan of reorganization.

South Street Seaport, supra, 94 F. 3d at 761, quoting *Theatre Holding Corp., supra*, 681 F. 2d at 105-06.

12. The foregoing factors are not exhaustive and, in appropriate cases, other factors may exist that should be considered. *See South Street Seaport, supra*, 94 F. 3d at 761, citing *In re Wedtech Corp.*,

72 B.R. 464, 471 (Bankr. S.D.N.Y. 1987); 2 Collier on Bankruptcy & 365.03[3] at 365-38 (15th ed. 1995). For instance, whether a debtor has remained current on rent during the postpetition period is one factor which may be considered in evaluating a request to extend the time to assume or reject a lease. *South Street Seaport, supra*, 94 F.3d at 761; *In re Caldor, Inc.-NY*, 217 B.R. 116 (Bankr. S.D.N.Y. 1998).

**The Debtor Should be Compelled to Forthwith
Assume or Reject the Lease Agreement**

13. Time is of the essence if the Golf Center is to remain economically viable. Upon information and belief, a chief competitor of the Golf Center and a significant vendor in the highly competitive golf equipment and outfitting industry in Southeastern Michigan is developing a domed golf facility approximately three (3) miles from the Golf Center. It is anticipated that this new facility will provide competitive amenities to the same consumer base and trade market targeted by the Golf Center.

14. Meanwhile, the Leased Property has, due to neglect by GBGC, deteriorated into a state of disrepair, requiring a significant investment of time and capital to improve and enhance its facilities, in order to compete with this new local facility and in the market generally.

15. The chief revenue-generating season for the Golf Center is approximately the months of October through May of each year (the "Season"). If and to the extent that AIF is required to stand still significantly past October 9, 2000, and if GBGC on or before that date rejects the Lease Agreement, the Season will have commenced before AIF is able to make the necessary repairs and capital improvements to the Golf Center to ensure that it remains a competitive and profitable enterprise. In such event, AIF will have suffered substantial and irreparable economic harm.

16. Accordingly, AIF needs to know whether GBGC intends to reject the Lease Agreement (and, if so, to regain possession of the Leased Property) as soon as possible, to mitigate the above-described prospective economic harm to AIF.

17. In addition, pursuant to the Lease Agreement, among other things, GBGC agreed to pay, when due, all taxes, assessments, levies, fees, water and sewer rents, and charges, and all other governmental charges, general and special, ordinary and extraordinary, together with any interest and penalties which are imposed or levied upon or assessed against the Leased Property. *See Lease Agreement at ¶8(a)(i)*. GBGC is in default of its obligation to pay postpetition real and personal property taxes with respect to the Leased Property, as required by Section 365(d)(3) of the Bankruptcy Code.

18. In light of the foregoing and with specific regard to the several factors that must be considered in evaluating whether to extend time for a debtor-in-possession to assume or reject an unexpired lease:

A. **The Debtors are not paying for the use of the Leased Property:** As demonstrated above, the Debtors have failed and refused, and continue to fail and refuse, to pay certain postpetition real and personal property taxes due and owing with respect to the Leased Property, pursuant to the Lease Agreement. *See South Street Seaport, supra*, 94 F.3d at 761; *Theatre Holding Corp., supra*, 601 F.2d at 105-06.

B. **The Debtors continued occupation of the Leased Property will damage AIF beyond the compensation available under the Bankruptcy Code:** As demonstrated above, the Debtors failure to maintain the Leased Property has caused the Golf Center to be at significant risk of losing its competitive place in the relevant market. Given that the 2000-2001 Season will commence at approximately the same time as the Debtors are required, pursuant to the Extension

Order, to seek to assume or reject unexpired leases of nonresidential real property, and in light of the fact that significant repairs and capital expenditures and improvements must be made to the Leased Property in order to ensure its continued profitability (and value to AIF in the event of rejection of the Lease Agreement), the extended deadline for assuming and/or rejecting the Lease Agreement is overly burdensome to AIF and will cause AIF significant damage beyond compensation which may be available under the Bankruptcy Code. *See South Street Seaport, supra*, 94 F.3d at 761; *Theatre Holding Corp., supra*, 601 F.2d at 105-06.

C. The Leased Property is not, by any estimation, the Debtor's primary asset:

The Debtors own and/or operate one hundred (100) golf facilities and seventeen (17) ice skating and family entertainment centers throughout North America. *See South Street Seaport, supra*, 94 F.3d at 761; *Theatre Holding Corp., supra*, 601 F.2d at 105-06.

19. Thus, for the foregoing reasons, cause exists for shortening the time by which the Debtor must seek to assume or reject the Lease Agreement, or alternatively, limiting any further extension.

WHEREFORE, AIF respectfully requests that this Court enter an Order:

A. Reducing the time by which Debtor GBGC Family Golf Centers, Inc. must seek to assume or reject the Lease Agreement, such that the Lease Agreement must be assumed or rejected;

B. Limiting the Debtor's time to assume or reject the Lease Agreement; and

C. Granting to AIF such other and further relief as this Court deems just and appropriate under the circumstances.

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COUNSEL FOR ALL IN FUN ENTERPRISES, INC.

Dated: September 15, 2000

EXHIBIT "A"

GROUND LEASE BETWEEN ALL IN FUN ENTERPRISES, INC.

AS LESSOR AND

GOLDEN BEAR GOLF CENTERS, INC.

AS LESSEE

Dated January 31, 1997

INTENTIONALLY OMITTED

**CONTACT COUNSEL FOR ALL-IN-FUN ENTERPRISES FOR COPY
OF LEASE**